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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 880

ROBERT A. KENNEDY, as Treasurer of the State of Arizona, ROY L. THORNBRUGH, as Registrar of Contractors of the State of Arizona and GARNER ELECTRIC COMPANY,

Petitioners,

vs.

LOUISE POWELL, Trustee in Bankruptcy of the Estate of Leon Showalter, bankrupt,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a contractor's cash deposit of $500 in the custody of the State Treasurer of Arizona passed to the Trustee when the contractor filed bankruptcy.

ARGUMENT

A. *No Conflict of Authority*

There is no decision of any other Court of Appeals in conflict with the instant decision of the Ninth Circuit. In fact, the only

Court decision cited by Petitioners which may be in conflict with the decision of the Court below is an Order of a Referee in Bankruptcy entered February 16, 1966, in a case in the Southern District of California, *In the Matter of J. W. Mitchell dba Mitchell Construction, Bankrupt,* No. 198258-PH (Pet. for Cert., App. 0). The joint *Amici* Brief indicates also that a Referee in the Central District of California has recently made a similar decision *In the Matter of Jolly William Kile,* No. 212,987-EC. However Respondent notes that the Attorney General of California took the position before the Referee in the *Kile* case that the California bonding statute is materially different from the Arizona statute here involved and that the California case is, therefore, distinguishable from the instant Arizona case (joint Brief of *Amici Curiae,* App. D).[1] In any event, the said Orders of the California Referees in the *Mitchell* and *Kile* cases, *supra,* are, at most, conflicting decisions of lower Courts within the Ninth Circuit.

The cases of *Betzer* vs. *Olney,* 14 Cal. App. 2d 53, 57 P.2d 1376 (1936), *In re Goldsby,* 51 F. Supp. 849 (S. D. Fla. 1943) and other surety bond cases cited by Petitioners (Pet. for Cert., pages 11-12) are obviously not pertinent here for those cases involved no property of the bankrupt but merely the secondary obligation of the surety to pay if the principal did not.

The decision of the Court of Appeals in the instant case is fully in harmony with the decisions of this Court in bankruptcy matters, including the recent case of *Segal* v. *Rochelle,* 382 U. S. 375, 86 S. Ct. 511, 15 L. Ed. 428 (1966) which also construes and applies Section 70(a)(5) of the Bankruptcy Act [11 U.S.C.A. Section 110(a)(5)]. The following quotation from the *Segal* opinion is directly in point:

> "The main thrust of § 70(a) (5) is to secure for creditors everything of value the bankrupt may possess in alien-

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[1]Respondent has not been able to analyze the numerous state bonding statutes attached to or referred to in the various *Amici* briefs but it is apparent that many of them differ considerably from the Arizona bonding statute here involved.

able or leviable form when he files his petition. To this end the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." (382 U.S. 379)

B. *No Important Issues Not Already Settled By This Court*

The issues in this case are simple, the sum of money involved is minor and the applicability of Section 70(a)(5) of the Bankruptcy Act is clear. As the Court of Appeals noted in its opinion, the State Treasurer of Arizona is the mere custodian of the cash deposit, not the owner of the fund [*Husky* v. *Lee,* 2 Ariz. App. 129, 406 P.2d 847 (1965)] and the conclusion is inescapable that the money in question was property of the contractor which, within the terms of Section 70(a)(5), "might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . ." by the contractor's creditors.

The broad scope of Section 70(a)(5) of the Bankruptcy Act is settled by the decision of this Court in *Segal* v. *Rochelle, supra.* That case presented a much more difficult issue than the instant case since the property here involved not only meets the transferability test of Section 70(a)(5) at least as well as the contingent tax loss carryback involved in the *Segal* case but also squarely meets the alternative test of being leviable or subject to seizure.

C. *The Courts Below Have Not Ordered Distribution to General Creditors*

The several *Amici* Briefs filed by various states in support of the Petition for Certiorari appear to be bottomed principally upon an erroneous impression that the decisions of the Court below require or permit distribution of the contractor's statutory cash deposit to general creditors. On the contrary, District Judge Muecke specifically ruled:

". . . The class of creditors afforded security by the provisions of A.R.S. § 32-1152 (1961) as these relate to a cash deposit, shall participate pro rata with other members of the

same class. Such participation shall be in accordance with regular bankruptcy procedures, including the method by which claims are filed, and the time within which such claims are paid." (Pet. for Cert., App. D)

The Trustee has not challenged this ruling and the Court of Appeals has affirmed the District Court. Thus, it is abundantly clear that the contractor's deposit will *not* be paid out by the Bankruptcy Court on claims of general creditors, as feared by the *Amici.*

D. *No Unjust Deprivation of "Vested Rights"*

Petitioners complain that pro rata distribution is "manifestly unjust" (Pet. for Cert., pp. 9-10) since certain creditors who have obtained judgments will not be permitted to deplete the cash deposit. Trustee does not agree that the Arizona statutory policy of payment only to the creditor or creditors who manage to obtain judgment before the deposit is exhausted is superior in justice to the Congressional policy of pro rata distribution to creditors of the same class. At any rate, since Section 70(a)(5) is applicable, the Congressional policy superseded the state policy on April 3, 1964, the date Showalter filed his Petition in Bankruptcy.

A few days before, on March 26, 1964, one creditor had obtained a judgment against Showalter and the State Treasurer jointly in a total amount of $145.61 (Pet. for Cert., App. J).[2] However, no payment had been made on the judgment as of April 3, 1964, so no title to any of the deposit money had passed to or "vested" in this judgment creditor as of that date.

The other three judgments referred to by Petitioners can be of no legal significance in this case. The judgment dated March 30, 1964, in favor of Ray Lumber Co. (Pet. for Cert., App. K) is void on its face for failure of plaintiff to name an indispensable party (the contractor) as a defendant (A.R.S. 32-1152 (D); Pet.

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[2]This judgment creditor, American Credit Bureau, Inc., has taken no part in the appeals in this case.

for Cert., App. A, K; R. 42-45.)[3] The remaining two judgments (Pet. for Cert., L, M) were not entered until after bankruptcy had been filed and the right of the Trustee to the deposit had "vested."

E. *Fear of Administrative Difficulties Unwarranted*

How the Attorney General can conclude that the decision of the Court of Appeals will render administration of cash deposits "virtually impossible" is a great mystery to the Trustee. The fact is that the Attorney General and other state officers and employees will be relieved by this decision of substantial administrative problems and labors (Compare Pet. for Cert., p. 9). Additionally, whenever a contractor files bankruptcy, creditors will be spared much expense of litigation and the necessity of racing each other to obtain first judgment as well as the disappointment and loss of realizing nothing at all if they do not win the race. Instead, each creditor of the special class will be able to obtain his fair share of the security deposit merely by filing a claim form with the Bankruptcy Court—a very simple and inexpensive administrative procedure.

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[3] The allegation at page 3 of the Petition for Certiorari that the judgment is against the bankrupt and the Treasurer jointly is in error (Pet. for Cert., App. K).

CONCLUSION

The Ninth Circuit Court decision in the instant case is not in conflict with the decision of any other Circuit or with any decision of this Court. It involves a question of the scope of Section 70(a)(5) of the Bankruptcy Act which has already been settled by the recent decision of this Court in *Segal* v. *Rochelle, supra.* The alarm purportedly felt by the Attorney General and the *Amici* with respect to the decision in this case is without reasonable cause and is based primarily upon an erroneous impression that the Courts below have ruled that the security deposit here involved is to be distributed to general creditors. Accordingly, Respondent submits that the Petition for Certiorari should be denied.

Respectfully submitted,

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January 13, 1967.